

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDDIE MASSEY

Claimant

VS.

**DAVID KOELZER TRUCKING
MIDWEST PMS**

Respondents

AND

UNKNOWN

FEDERATED INSURANCE COMPANY

Insurance Carriers

Docket No. 228,287

ORDER

Respondent, Midwest PMS, and its insurance carrier, and claimant both appeal from a preliminary hearing Order entered by Administrative Law Judge Kenneth S. Johnson on February 12, 1998.

ISSUES

In its Application for Review, respondent asserts that the ALJ exceeded his jurisdiction in ordering temporary total disability benefits "until further order or until certified by Dr. Brian M. Gross as having reached maximum medical improvement; or released to regular job; or becomes re-employed, whichever comes first." Respondent asserts that this order exceeds the jurisdiction of the ALJ because there are other circumstances which would warrant termination of temporary total disability benefits. In its brief, respondent also asserts that claimant's injury is not compensable and that any temporary total disability is associated with a preexisting non-work related condition, namely hypertension.

Claimant, on the other hand, asked for review of the following issues: (1) whether the ALJ erred in denying claimant's request for temporary total disability benefits retroactive to April 24, 1997; (2) whether the ALJ erred in failing to award past medical bills

to be paid as authorized; (3) whether the ALJ erred in entering an order inconsistent with what the ALJ said he would order at the time of the preliminary hearing; and, (4) whether the ALJ erred in calculating the average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the ALJ should be affirmed.

Jurisdiction of the Board is limited when considering appeals from preliminary hearing orders. The Board may review allegations that the ALJ exceeded his or her jurisdiction. K.S.A. 1997 Supp. 44-551. Specific examples of jurisdictional issues are listed in K.S.A. 1997 Supp. 44-534a.

Respondent's Issues

The first issue raised by respondent concerns the language of the order which indicates how long the respondent must pay benefits. As above indicated, respondent contends the language fails to include all contingencies which might warrant termination of temporary total disability benefits. Even though the Board agrees there may be circumstances other than those identified in the order which would warrant termination of temporary total disability benefits, the Board does not consider this to be a jurisdictional issue. If such other eventuality arises, the respondent may file its own application for preliminary hearing and seek termination of the benefits.

Respondent next contends that the claim is not compensable and that any temporary total disability is associated with a preexisting non-work related condition. The evidence presented at the preliminary hearing indicates that on April 23, 1997, in the course of his employment for respondent, claimant was exposed to ammonia. He was working as a truck driver hauling urea, a liquid cattle feed supplement which contains ammonia. The exposure occurred while unloading. Since the exposure, claimant has had problems with breathing and with an erratic heartbeat. Claimant also suffers from hypertension.

After reviewing the medical records, the Board concludes the ALJ did not exceed his jurisdiction in finding the claim compensable and in awarding both medical and temporary total disability benefits. It is true, as respondent points out, Dr. Brian M. Gross expresses an opinion that claimant cannot work due to his hypertension. Dr. Gross also apparently has concluded that claimant suffered an acute episode of atrial fibrillation as a result of the ammonia exposure but that any ongoing atrial fibrillation is more likely an underlying condition unrelated to that exposure. Dr. Gross does, however, recommend that claimant receive additional testing to determine whether claimant suffers from a chronic pulmonary toxicity as well as further testing to determine whether he is still having atrial fibrillation episodes.

Dr. Michael H. C. Wei states that in his opinion the unprotected exposure to ammonia caused an inhalation lung injury and the severity of that distress is shown by the

atrial fibrillation that has developed. He concludes that claimant may have a respiratory problem and/or sleep apnea which makes it "difficult and probably unsafe for him to continue work until this problem is diagnosed and under control."

While the medical evidence indicates that the relationship between the ammonia exposure and claimant's current medical problems is yet undetermined, the Board concludes that the ALJ did not exceed his jurisdiction in finding the need for medical treatment and temporary total disability relate to the on-the-job exposure to ammonia.

Claimant's Issues

The Board has concluded that the issues raised by claimant are not jurisdictional issues. The preliminary hearing procedure is intended as an expedited process to initiate medical treatment and temporary total disability benefits. The decision not to award retroactive temporary total disability benefits or payment of past medical bills does not exceed the jurisdiction of the ALJ.

Similarly, the ALJ does not exceed his jurisdiction when his subsequent order is not the same as the order he suggested at the conclusion of the preliminary hearing. In this case, the ALJ suggested he likely would order the respondent to provide the names of three pulmonary specialists. Instead, he has assigned Dr. Brian M. Gross as the treating physician. The latter written order controls and does not exceed the ALJ's jurisdiction.

Finally, the issues listed in claimant's application for review include the calculation of the average weekly wage. Claimant does not address that issue in his brief, and the Board also finds that the calculation of the average weekly wage is not a jurisdictional question. The ALJ has jurisdiction to determine the average weekly wage for purposes of awarding benefits in preliminary hearings.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order by Administrative Law Judge Kenneth S. Johnson, dated February 12, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Office of Administrative Law Judge, Garden City, KS
Philip S. Harness, Director